

Bond

Freedom of Information Law 101

A Freedom of Information Act Overview

Presented by:
Kristin Warner, Esq.

What is FOIL?

- FOIL requires governmental agencies, including village, towns, cities, libraries, public authorities and school districts, to enact rules and regulations governing the availability of records; to maintain certain records; and to make all records available for public inspection and copying except those specifically defined in statutory exceptions.
- FOIL can be found in the New York Public Officers Law Sections 84-90.

Policy and Rules

- Each agency must have written rules and regulations pertaining to the availability of records, including but not limited to:
 - The times and places records are available;
 - The persons from whom records may be obtained (e.g., the Records Access Officer); and
 - Fees for copies of records

Inspection and Copying

- Records must be available for inspection and copying at all reasonable times, *i.e.*, during all hours that the entity is regularly open for business.
- Any member of the public may inspect or obtain copies of records, whether or not he or she resides in the village, town, city, etc.
- Any person has the right to inspect accessible records at no charge.
- However, there may be situations in which some aspects of a record – but not the entire record – may be properly withheld. In that case, the agency may prepare a redacted copy and charge the established fee for the copy (*i.e.*, \$.25 per page).

What are Records?

- Under FOIL, a “record” is defined as “any information kept, held, filed, produced, or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever.”
- This can include, but is not limited to:
 - Letters/Emails
 - Text Messages
 - Personnel records
 - Contracts, vendor data, invoices, etc.
 - Voter Rolls
 - Recordings of Public Meetings

What are Records?

- Are emails from a public official's personal emails discoverable under FOIL?
 - Yes.
- Are text messages sent between public officials' personal cell phones discoverable under FOIL?
 - Yes.

The NYS Committee on Open Government has stated “electronic communications, such as e-mails or text messages that involve [government] business, whether stored on a government or a personal device, constitute ‘records’ that fall within the coverage of FOIL.”

Records That Must Be Maintained by Statute

- A record of the final vote of each member in every proceeding in which the member votes;
- A record setting forth the name, public office address, title and salary of every officer or employee of the entity; and
- A reasonably detailed current list, by subject matter, of all records in the possession of the entity, whether or not available under FOIL. The subject matter list must be updated annually.

Records To Be Made Available

- Each agency must make available for public inspection and copying all records **except** those allowed to be withheld under law, specifically NYS Public Officers Law §87(2).

Records That May Be Withheld

- Exempt by another state or federal statute, e.g.
 - Family Educational Rights and Privacy Act (FERPA)
 - Attorney-client communications;
- Unwarranted invasion of personal privacy Public Officers Law Section 89(2);
- Impairment of present or imminent contract awards or collective bargaining negotiations;
- Trade secrets or records/information from commercial enterprise which, if disclosed, would cause substantial injury to the competitive position of the enterprise

Records That May Be Withheld cont'd

- Compiled for law enforcement purposes and which, if disclosed, would:
 - Interfere with law enforcement investigations or judicial proceedings;
 - Deprive a person of a right to a fair trial or impartial adjudication;
 - Identify a confidential source or disclose confidential information relating to a criminal investigation; or
 - Reveal criminal investigative techniques or procedures, except routine techniques and procedures
- Endangerment of the life or safety of any person;

Records That May Be Withheld cont'd

- Inter-agency or intra-agency materials which are not:
 - Statistical or factual tabulations or data;
 - Instructions to staff that affect the public;
 - Final agency policy or determinations;
 - External audits, including but not limited to audits performed by the comptroller and the federal government
- Examination questions or answers which are requested prior to the final administration of such questions;
- Computer access codes;

Examples of Records That May Be Exempt From Disclosure

- ADA/FMLA leave related records
- Non-final disciplinary records, such as counseling memos, investigation notes, warnings, etc.
- Medical treatment records
- Home addresses/phone numbers/personal email addresses
- Workers Compensation records
- Parts of resumes/CVs that are unrelated to the position for which the public employee was hired such as college GPA, marital status, hobbies, etc.

Examples of Records That May Be Exempt From Disclosure cont'd

- Application materials for unsuccessful job candidates
- Individualized Education Programs

Unwarranted Invasion of Personal Privacy?

- Employment, medical or credit histories or personal references of applicants for employment;
- Medical or personal records of a client or patient in a medical facility;
- Sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
- Disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it

Unwarranted Invasion of Personal Privacy

- Information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law;
- Disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law; or
- Disclosure of law enforcement arrest or booking photographs of an individual, unless public release of such photographs will serve a specific law enforcement purpose and disclosure is not precluded by any state or federal laws.

Inter/Intra Agency Exception

- Designed to provide for open internal communications
- Does not include:
 - Statistical or factual tabulations or data;
 - Instructions to staff that affect the public;
 - Final agency policy or determinations;
 - External audits, including but not limited to audits performed by the comptroller and the federal government

Common Myths about FOIL

- The “Draft” myth
- The “minutes” myth
- The “personnel records” myth
- The “confidentiality clause” myth

Procedures: Responding to a Request

- Must respond to a written request for a record reasonably described within **five (5) business days** of receipt of the request by:
 - Making the record available; or
 - Denying the request in writing; or
 - Furnishing a written acknowledgement of the receipt of the request and a statement of the approximate date, which is reasonable under the circumstances of the request, when the request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with Public Officers Law Section 89(5).

Procedures: Constructive Denial

- If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, or if a public entity delays responding for an unreasonable time after it acknowledges that a request has been received, a request may be considered to have been constructively denied.
- Constructive denials may be appealed.

Procedures: Extensions

- If request cannot be fulfilled within twenty (20) business days from the date of the acknowledgement of the receipt of the request, the agency must state, in writing, the **reason** for the inability to grant the request within twenty (20) business days and **a date certain within a reasonable period**, when the request will be granted in whole or in part.

Procedures: Voluminous Requests

- Cannot deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome.
- If the agency lacks sufficient staffing, it may engage an outside professional service to provide copying, programming, or other services required to provide the copy.

Procedures: Creating Records

- No obligations to prepare a record that it does not possess or maintain. However...
 - If portions of records (i.e., databases) can be extracted or generated from existing records with reasonable effort, the agency is required to do so.
 - Any programming necessary to retrieve a record maintained in a computer storage system and to transfer the record to the medium requested by a person is not deemed to be the preparation or creation of a new record.

Procedures: Fees

- Can charge \$0.25 per page.
- Can charge a fee for a medium (i.e., flash drive)
- Can require payment in advance of the preparation of copies.
- Cannot charge for employee copying/searching/redacting time.
- The Committee on Open Government:
 - “Based on the language of the statute, it is clear that the **only fee** that may be charged when a request involves photocopies of paper records up to nine by fourteen inches is a maximum of twenty-five cents per photocopy; no additional fee may be charged for employee time, for search, redactions, etc.”

Procedures: Fees cont'd

- Employee time may be charged only when the request involves “other” records, those that are larger than nine by fourteen inches or which are maintained electronically, and even then, only in circumstances in which at least two hours of employee time are needed to prepare the records.
- The provisions concerning the actual cost of preparing copies of records specify that “preparing a copy ***shall not include search time or administrative costs***” (see 87[1][c][iv]).

Procedures: Fees cont'd

- Employee time for electronic records can be charged if there is programming involved to cull a large database but only when at least two hours of an employee's time is necessary to prepare electronic copies.
- “If the document exists in electronic format and the agency has the authority and the ability to redact electronically, we believe it would be reasonable for the agency to provide the requested redacted copy at no charge, in light of the statutory fee provisions.” – FOIL-AO-19103

Procedures: Electronic Documents

- “With respect to scanning paper records in order to transmit them via email, it is our view that if the agency has the ability to do so and when doing so will not involve effort additional to an alternative method of responding, it would be required to scan the records.” – FOIL-AO-18620
- “When materials can be emailed there would be no fee because the records are not photocopied and a storage medium is not involved.” – FOIL-AO-18620

Administrative Appeal

- Denials can be appealed in writing within 30 days
 - Appeals go to the agency's head or chief executive or governing body or individual designated by the governing body to receive and decide such appeals.
- Response must be made within 10 business days of receipt and must fully explain in writing to the person requesting the record the reasons for further denial or access to the record sought must be provided.

Administrative Appeal cont'd

- Response must provide a “particularized and specific justification for denying access” or a “factual basis” for claiming an exemption.
- Appeal and the determination must be filed with the Committee on Open Government.

Judicial Appeal

- Appeal denials can be challenged in State Supreme Court pursuant to CPLR Article 78.
- The court must award reasonable attorney's fees and other litigation costs against the agency if the person requesting the record substantially prevails and the court finds that the agency had no reasonable basis for denying the request.

Recent Cases

- *In re Uniformed Patrolmen's Assoc. of the Town of Greece PD and Town of Greece* (PERB ALJ, April 4, 2023)
 - Internal pre-disclosure procedures related to release of police disciplinary files are a mandatory subject of negotiation (employee notice or review, redaction, etc.)
 - Town violated Taylor Law by refusing to bargain with the police union over these pre-disclosure **procedures**

Recent Cases

- *Matter of Oustatcher v. Clark*, (2d. Dep't, June 8, 2023)
 - Request for various categories of records pertaining to attorneys who have “committed misconduct,” regardless of whether any consequences were imposed
 - Denial upheld because the request “failed to described the documents sought with sufficient specificity as to permit respondents to identify and locate them.”
 - Not stored in a centralized manner, and response would involve manually reviewing employees’ personnel files and making individual determinations as to each employee

Recent Cases

- *Law Offices of Cory H. Morris v. Suffolk Cnty.*, (2d Dep't, May 3, 2023)
 - July 5, 2018: FOIL request submitted to Agency's Chief Clerk; no acknowledgment received
 - July 16, 2018: Submitted second letter to Chief Clerk, labeled "notice of appeal"; no response
 - August 15, 2018: Filed Article 78 seeking records and attorney's fees

Recent Cases

- *Law Offices of Cory H. Morris v. Suffolk Cnty.*, (2d Dep't May 3, 2023)
 - After Article 78 filed, County provided some documents; denied others
 - County argued requester did not appeal properly; was not sent to the County's FOIL appeals officer
 - Court rejected this argument; *when agency fails to tell the requester of the right to appeal, the requirement of exhaustion is excused*
 - County argued the litigation as academic because they responded after it was filed
 - Court rejected this argument; they only provided certain documents and relied on exemptions for others, there was a dispute over the exemptions

Recent Cases

- *Matter of Lambrou v. New York City* (1st Dep't, Nov. 29, 2022)
 - City reviewed and responded to the FOIL request after Article 78 filed
 - City's response rendered the proceeding moot; Petitioner did not amend the petition to challenge later determination of the request and the validity of respondent's claimed exemptions not before the Court

Recent Cases

- *Reclaim the Recs. v. City of New York*, (1st Dep't, March 14, 2023)
 - Requester sought “uncompressed, high-definition, large-sized, non-watermarked digital images of the Kings County ‘Old Town’ records”
 - City provided low-resolution images and made high-resolution copies of the records publicly available on a website
 - “Making records available on line via the internet...effectively exceeds any requirements imposed by the Freedom of Information Law.”

Questions

- If you have any questions that arise after this session, feel free to direct them to Kristin Warner at kwarner@bsk.com

Thank you!